Supreme Court, U.S.
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No. _____

In the

Supreme Court of the United States

October Term, 1994

Mark Dusbabek, et al.,

Petitioners,

v.

Reggie White, National Football League, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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April 19, 1995

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QUESTIONS PRESENTED

1. Whether the constitution provides a right to opt out of a class action involving claims for monetary relief. Brown v. Ticor Title Insurance Co., 982 F.2d 386 (9th Cir. 1992), cert. granted in part, 114 S.Ct. 56 (1993), cert. dismissed as improvidently granted, 114 S.Ct. 1359 (1994); Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985), cert. denied, 487 U.S. 1223 (1988).

2. Whether the federal District Court erred in certifying a mandatory, non-opt out class under Rule 23.

3. Whether the District Court erred in failing to ensure that the settlement was fair, reasonable and adequate.

LIST OF PARTIES

All Parties to this Petition are not listed in the caption.

Petitioners are Mark Dusbabek, Carl Lee, Audray McMillian, Felix Wright, Cody Risien, Mark Harper, Sammy Martin, Don Beebe and Gregory Scales. These National Football League ("NFL") player Petitioners were known collectively as the "Vikings Appellants" in the proceedings before the United States Court of Appeals for the Eighth Circuit, and as the "Vikings Objectors" or "Vikings Plaintiffs" in the proceedings before the United States District Court, District of Minnesota. These Petitioners are represented by the Schatz Paquin law firm.[1]

Petitioners also include NFL player Petitioners Maurice Hurst and John Fourcade who were represented by the Wiedemann & Wiedemann law firm in the proceedings below, and Byron Evans represented by the Haralson, Kinerk & Morey firm.

Additional Petitioners will appear separately.[2]

Respondents are NFL players Reggie White, Michael Buck, Hardy Nickerson, Vann McElroy and Dave Duerson. These Respondents were plaintiffs in the proceedings before the United States District Court, District of Minnesota, and appellees before the United States Court of Appeals for the Eighth Circuit.

Respondents also include National Football League; The Five Smiths, Inc.; Buffalo Bills, Inc.; Chicago Bears Football Club, Inc.; Cincinnati Bengals, Inc.; Cleveland Browns, Inc.; The Dallas Cowboys Football Club, Ltd.; PDB Sports, Ltd.; The

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[1] The name of the Schatz Paquin firm has changed during the course of the proceedings below, but there has been no change in counsel of record for these Petitioners other than Vance Opperman no longer being one of the counsel for these Petitioners.

[2] Petitioners represented by the law firm Howarth & Smith will file an appendix of the voluminous orders and decisions below to which Petitioners herein join.

Detroit Lions, Inc.; The Green Bay Packers, Inc.; Houston Oilers, Inc.; Indianapolis Colts, Inc.; Kansas City Chiefs Football Club, Inc.; The Los Angeles Raiders, Ltd.; Los Angeles Rams Football Company, Inc.; Miami Dolphins, Ltd.; Minnesota Vikings Football Club, Inc.; KMS Patriots Limited Partnership; The New Orleans Saints Limited Partnership; New York Football Giants, Inc.; New York Jets Football Club, Inc.; The Philadelphia Eagles Football Club, Inc.; B & B Holdings, Inc.; Pittsburgh Steelers Sports, Inc.; The Chargers Football Company; The San Francisco Forty-Niners, Ltd.; The Seattle Seahawks, Inc.; Tampa Bay Area Pro-Football, Inc. These Respondents were defendants in the proceedings before the District Court, and appellees before the Court of Appeals.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

Mark Dusbabek, Carl Lee,
Audray McMillian, Felix Wright,
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Sammy Martin, Don Beebe
Gregory Scales, Byron Evans,
Maurice Hurst, and John Fourcade,

Petitioners,

v.

Reggie White, National Football League, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners respectfully ask that a Writ of Certiorari issue to review the judgments of the United States Court of Appeals for the Eighth Circuit and United States District Court for the District of Minnesota in this case.

OPINIONS BELOW

Petitioners appeal from the following decisions of the United States District Court, District of Minnesota:

(1) April 30, 1993 Order[3] denying, inter alia, all motions to object to the class action settlement agreement in this case, including the monetary and injunctive provisions therein, and granting the motion of the NFL to enjoin certain cases, including the individual Complaints filed by Petitioners herein;

(2) August 19, 1993 Order[4] granting, inter alia, final approval to the amended stipulation and settlement agreement (the "Settlement Agreement"); and

(3) August 20, 1993 Final Consent Judgment.[5]

Petitioners also appeal from the following decisions of the United States Court of Appeals for the Eighth Circuit:

(4) December 6, 1994 panel affirmance of the decisions of the District Court;[6] and

(5) January 20, 1994 denial of Petitioners' request for rehearing and request for rehearing en banc.[7]

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[3] This order is reported at 822 F. Supp. 1389 (D.Minn. 1993) and is reproduced in the Appendix at 170-300.

[4] This order is reported at 836 F. Supp. 1458 (D.Minn. 1993) and is reproduced in the Appendix at 34-169.

[5] This judgment is reported at 836 F. Supp. 1508 (D.Minn. 1993) and is reproduced in the Appendix at 26-33.

[6] This order is reported at 41 F.3d 402 (8th Cir. 1994) and is reproduced in the Appendix at 2-17.

[7] This order is unpublished and is reproduced in the Appendix at 1.

JURISDICTION

The Eighth Circuit judgment was entered December 6, 1994. Petitions for rehearing and rehearing en banc were denied January 20, 1995. This Court has appellate jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND RULE INVOLVED

Amendment V to the United States Constitution provides, in relevant part: "No person shall ... be deprived of life, liberty, or property, without due process of law."

The certification and settlement of the class action below was carried out pursuant to Fed.R.Civ.P. 23, fully set forth in the Supplemental Appendix.

STATEMENT OF THE CASE

Introduction

The District Court[8] certified a class and approved a settlement in an antitrust class action brought by certain NFL players against each of the 28 NFL member teams for anticompetitive conduct, including anticompetitive restraints on the rights of players to move from one team to another, the likes of which have plagued the NFL for years.[9] While league-wide damages in this case exceed half a billion dollars, the District Court, in addition to other errors of law, approved a settlement agreement for approximately 20% of the actual antitrust damages

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[8] Hon. David S. Doty, United States District Court Judge, District of Minnesota.

[9] See generally, White, 822 F. Supp. at n.2 (discussing history of NFL antitrust violations).

to the NFL players and certified the settlement class as a mandatory, non-opt out class under Rule 23 -- holding, without evidentiary support and in the face of a $200 million dollar settlement fund, that the case did not involve sufficient claims for monetary relief to afford absent class members their constitutional right to opt out of the class. Instead, the District Court found the settlement was fair, adequate and reasonable. Petitioners appealed. 41 F.3d at 406 (App. 9).

A three-member panel of the United States Court of Appeals for the Eighth Circuit[10] affirmed. Id. at 405 (App. 9).

Petitioners (all absent class members in the White v. NFL litigation and settlement) had moved to intervene in the White action. 822 F.Supp. at 1399, 1432-33, n. 17 (App. 187, 285-88, 298-99). Those motions were denied, other than to allow Petitioners to intervene in order to formally object to the proposed settlement and class certification and to preserve their rights to appeal. Id. Petitioners argued before the District and Appellate Courts that the United States Supreme Court's holding in Shutts[11] and the holding of the Ninth Circuit Court of Appeals in Ticor[12] that an absent class member is constitutionally entitled to opt out of a class involving claims of monetary relief, entitled Petitioners here to opt out of the White settlement class. The Court of Appeals reasoned that by moving to intervene, however, Petitioners were no longer "absent" class members. 41 F.3d at 406-07 (App. 12-14). That finding of the Court of Appeals not only conflicts with decisions of this and other courts, but it creates new precedent which renders this Court's decision in Shutts virtually meaningless.

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[10] Hon. Theodore McMillian, Hon. David R. Hansen, and Hon. Morris S. Arnold, Circuit Judges.

[11] Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985).

[12] Brown v. Ticor Title Ins. Co., 982 F.2d 386, 392 (9th Cir. 1992), cert. granted in part, 114 S.Ct. 56 (1993), cert. dismissed as improvidently granted, 114 S.Ct. 1359 (1994).

Under the panel's construction of these jurisdictional principles (and misapprehension of those principles as affecting Rule 23 constitutional considerations), there could be no conceivable circumstance where any absent class member would be entitled to opt out of a damages class. That result does not conform with the principles articulated in Shutts, nor does it bode well for future class actions involving these frequently arising issues – issues which this Court attempted to resolve in Ticor.

The two fundamental injustices which occurred in this case before the District Court – (1) failure to certify the class under Rule 23(b)(3); and (2) approval of the unfair, unreasonable and inadequate injunctive and monetary provisions of the Settlement Agreement – were as inequitable as the stream of misguided attempts to resolve the antitrust concerns which have plagued the NFL in various forms of anticompetitive NFL "rules" for years.

NFL antitrust history

Despite the availability to players of collective bargaining, professional sports players historically have been largely unsuccessful in eradicating oppressive restrictions on their mobility and earning power in a truly free market place.[13]

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[13] See, e.g., Brown v. NFL, 1995 WL 115729, *15 (D.C.Cir.) ("[E]mployer restraints on the labor market are most prominent in professional sports. Employers in other fields generally favor open competition in the labor market, believing that, in the absence of chronic labor shortages, competition for jobs will generally hold down wages and produce higher quality and better motivated workers. ... In professional sports, however, the situation is reverse. Because top athletic talent is scarce, competition tends to drive salaries up, at least for the top performers. Thus professional athletes have sought to maximize competition among employers for their unique athletic skills. Predictably, the owners have reacted with multiemployer efforts to restrain competition for professional athletes' services. [Citing football, basketball, baseball, and hockey litigations.] Nonetheless, it is important to remember that multiemployer labor market restraints are not entirely confined to professional sports, so that today's

Significant in the NFL history are the number of ill-conceived and poorly executed attempts by the NFL to keep as much control as possible over the players, the real parties in interest here. Equally disparaging are the variety of "new systems" which have been created to do essentially the same thing--pay players far less than the true market value of their services while retaining the utmost control over player mobility.

Mackey, supra, was filed on behalf of NFL players to challenge the "Rozelle Rule." That rule gave then NFL Commissioner Pete Rozelle significant control and power to set compensation for teams that lost players to other teams. The players won Mackey, and as a result the NFL and the players' association ("NFLPA") entered into collective bargaining agreements which provided for a "Right of First Refusal" and a related team "Compensation system" to remain in force. In 1987, when the 1982 collective bargaining agreement expired, the NFLPA tried to enter a new collective bargaining agreement with the NFL. The NFL wanted to continue the restrictive system, however, so the players went on strike. That strike, however, failed to lead to a new collective bargaining agreement.[14] Thus, certain players filed a class action complaint in October 1987 in

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majority rule has implications beyond the football gridiron."; (citations omitted)). See also Mackey v. NFL, 407 F. Supp. 1000, 1010 (D. Minn. 1975) ("from its inception through the present day, [the players' union] has been too weak vis-a-vis the clubs to obtain elimination of or even a reasonable modification of the Rozelle Rule").

[14] See Berry & Gould, A Long Deep Drive to Collective Bargaining: Of Players, Owners, Brawls, and Strikes, 31 Case W. Res. L. Rev. 685, 747 (1981) (the threat of anticompetitive liability was the most powerful force in promoting collective bargaining between owners and players). See also Garvey, Forward to the Scope of the Labor Exemption in Professional Sports: A Perspective on Collective Bargaining in the NFL, 1989 Duke L.J. 328, 330 ("Given the ease with which the NFL crushed the union's 1987 strike, an obvious mismatch at the bargaining table exists.") Mr. Garvey is the former Executive Director of the NFLPA.

the District of Minnesota against the NFL and its 28 member teams, alleging that the continued imposition of this system -- without union consent -- constituted an unreasonable restraint of trade in violation of the antitrust laws. Powell v. NFL, 678 F.Supp. 777 (D. Minn. 1988). Defendants moved for summary judgment, arguing that the challenged restraints remained protected by the "nonstatutory labor exemption" to the antitrust laws, even though there no longer remained any relevant labor agreement. On January 29, 1988, the District Court denied summary judgment, and ruled that where a challenged restraint on competition was incorporated in a bona fide collective bargaining agreement, the nonstatutory labor exemption from the antitrust laws survived only until such time as the parties reached a bargaining impasse. Id. at 789.

On July 11, 1988, the District Court in Powell ruled that, as the NFLPA and the NFL had in fact reached an impasse regarding the restrictive system, these restraints were subject to the antitrust laws, and were likely to be found at trial to be an antitrust violation. Powell, 690 F.Supp. 812, 814, 818 (D. Minn. 1988). In response to that ruling, the NFL unilaterally and without player approval implemented "Plan B" on February 1, 1989.[15]

On November 1, 1989, the Eighth Circuit reversed the summary judgment ruling and held the nonstatutory labor exemption continued to protect the NFL's player restraints until the players abandoned their collective bargaining rights. Powell, 930 F.2d 1293, 1303-04 (8th Cir. 1989), cert. denied, 498 U.S. 1041, 111 S.Ct. 711 (1991). The players did so. Powell, 764 F.Supp. 1351, 1356 (D. Minn. 1991).

Eight football players (the "McNeil plaintiffs") then sued the NFL in the District of Minnesota, alleging that the unilateral imposition of Plan B restraints constituted an illegal trade

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[15] See McNeil v. NFL, 790 F.Supp. 871, 876 n. 4 (D. Minn. 1992) (discussing components of Plan B).

restraint. The District Court refused to dismiss the plaintiffs' challenge to Plan B, holding that "the proposed wage scale would likely violate Section 1 of the Sherman Act." McNeil, 790 F.Supp. 871 (D. Minn. 1992). McNeil then came to trial, and the jury returned a verdict finding that Plan B and the First Refusal/Compensation rules violated Section 1 of the Sherman Act, and awarded damages. McNeil, 1992 WL 315292, at *1 (D. Minn. Sept. 10, 1992).

The White litigation

On September 21, 1992, this case, a proposed class action seeking injunctive relief against the NFL, was filed in the District of Minnesota. 822 F. Supp. at 1394 (App. 171). A First Amended Complaint was later filed, adding a class action monetary damages claim under Rule 23(b)(3). Id. at 1395 (App. 173). The District Court then certified a 23(b)(1) damages and injunctive settlement class. 822 F. Supp. at 1395 (App. 174-75).

The Plan B restraints found illegal by the McNeil jury were in full force and effect during the career primes of each Petitioner here who has suffered monetary injury directly resulting from the NFL's restrictive practices. Therefore, certain Petitioners filed similar federal lawsuits in Minnesota.[16] 822 F.Supp. at 1433, nn. 73, 74 (App. 288-89).

The District Court enjoined Petitioners from pursuing their complaints, 822 F. Supp. at 1433-35, 1436-37 (App. 288-94, 299-300), approved the White settlement, and entered judgment.

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[16] See White, 822 F. Supp. at 1436-37, enjoining seventeen lawsuits, including those involving certain Petitioners here (App. 299). Each Petitioner here, among numerous others, also formally objected to the preliminary and final approval of the Settlement Agreement, challenging both the reasonableness, adequacy and fairness of the agreement and the propriety of the District Court's certification of a Rule 23 mandatory, non-opt out class. 822 F.Supp. at 1397-98, 1424-25 & nn. 11, 12, 13, 50, 51, 52, 53 (App. 180-83, 262-65 and notes).

See generally 836 F. Supp. 1458 (App. 34-169), 836 F. Supp. 1508 (App. 26-33).

The final Settlement Agreement includes, among other things, structural and monetary "relief" which, Petitioners vehemently argued before the District and Appellate Courts, is nothing of the sort. The agreement attempted to replicate true, free, agency but fell far short. See 41 F.3d at 405 ("The central issue in this labor dispute was the conflict between the player's desire to complete free agency and the NFL's desire to maintain competitive balance among its teams") (App. 9-10). The settlement also fell well short of adequately compensating the class. While experts set damages figures in excess of half a billion dollars, the agreement provided that the NFL would pay White class members less than $200 million over time. While the settlement claimed to provide an average absent class member player benefit of about $100,000 under a point allocation system, 822 F.Supp. at 1419 (App. 246), the named plaintiffs secured for themselves (but not for the class they purportedly represented) their full damages. Id. at 1415 (App. 233).[17] Each of Petitioners' procedural and substantive objections to the class certification and settlement were rejected. See generally 41 F.3d 402 (App. 2-17).

REASONS FOR GRANTING THE WRIT

This Court held in Shutts that absent class members in Rule 23 class actions "wholly or predominantly" involving claims for monetary relief are constitutionally entitled to opt out of such damages classes. That mandate was followed and expanded by

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[17] Vann McElroy, for example, secured for himself (and at the sacrifice of the class he was named here to represent) his actual damages of $470,194. Another named plaintiff in a related case which was consolidated with White secured for himself his actual damages of $711,600. Id. Petitioners presented the District and Appellate Courts with data showing Petitioners' actual damages were hundreds of thousands of dollars in excess of the $70,000 available to them as class members under the point allocation system.

the Ninth Circuit in Ticor, which held that this mandate applies whenever "substantial damages claims" are asserted. This is such a case.

In dissenting from this Court's dismissal of the writ of certiorari in Ticor, Chief Justice Rehnquist and Justices O'Connor and Kennedy urged this Court to rule on the constitutional issue presented there, and stated: "The resolution of a constitutional issue with such broad-ranging consequences is both necessary and appropriate. ... Either an opt-out right is constitutionally required, or it isn't. ... We granted certiorari to consider whether such a right exists. The issue has been thoroughly briefed and argued by the parties. We should decide it."[18] This Court now may do so.

I. THIS CASE PRESENTS AN IMPORTANT QUESTION, WITH BROAD IMPLICATIONS FOR THE ADMINISTRATION OF FEDERAL CLASS ACTIONS, WHICH THIS COURT RECENTLY ATTEMPTED TO DECIDE IN TICOR.

Underlying the intent of Rule 23 is the balance of consolidating or avoiding conflicting interests: judicial economy and efficiency of mass litigation on the one hand,[19] and the liberty rights of individuals to pursue their own litigation fate on the other.[20] The latter fundamental liberty interest was recognized long ago in Hansberry v. Lee, 311 U.S. 32 (1940). There, the Supreme Court held that the res judicata or mandatory effect of a purported class suit involving a restrictive property agreement

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[18] 114 S.Ct. 1359, 1363-64.

[19] See, e.g., 3 H. Newberg, Newberg On Class Actions § 717.06 (3d ed. 1992).

[20] See, e.g., Miller & Crump, Jurisdiction And Choice Of Law In Mandatory Class Actions After *Phillips Petroleum Co. v. Shutts*, 96 Yale L.J. 1 (1986).

violated the plaintiffs' due process rights. 311 U.S. at 40-42. The due process concern highlighted by the Supreme Court decades ago in Hansberry remains a fundamental concern today.

The two most recent and important decisions regarding due process constraints on class actions are Shutts and Ticor. The Supreme Court in Shutts and later appellate authority hold that due process requires a class action involving substantial claims for money damages to provide at a minimum an opt-out provision.

Shutts, a class action, involved claims made against a gas company for money damages resulting from delayed interest payments made to leaseholders. The leaseholders resided in all 50 states, the District of Columbia, and several foreign countries. In approving class certification under a Kansas statute similar to Rule 23(b)(3), the Supreme Court held:

> If the forum State wishes to bind an absent plaintiff concerning a claim for money damages or similar relief at law, it must provide minimal procedural due process protection. . . . Additionally, we hold that due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an "opt out" or "request for exclusion" form to the court.

472 U.S. at 812. See also Ticor, 982 F.2d at 393 (citing Shutts).

Ticor involved the consolidated multijurisdictional litigation of antitrust claims brought by title insurance holders against Ticor and other title companies. Id. at 387-88. Class plaintiffs alleged price fixing and sought monetary and injunctive relief. Id. Several cases were consolidated as Multidistrict Litigation ("MDL") 633 and the class was certified as a mandatory class under Fed. R. Civ. P. 23(b)(1) and (b)(2). Id. at 388-89. Thereafter, a global settlement was reached between the parties and was approved by the MDL 633 court. Id. at 388.

Both the Attorney General of Arizona and an individual plaintiff who represented a class of plaintiffs in two other states were allowed to pursue post-settlement cases against defendants, over defendants' objections that res judicata bound these plaintiffs to the MDL 633 settlement agreement. Id. at 388-90, 392. The Ninth Circuit disagreed, and held that precluding a plaintiff from opting out of a mandatory class certified under Rule 23(b)(1) involving monetary and injunctive claims would violate due process. Id. at 392.

The Ninth Circuit also held that although res judicata would bar the absent class plaintiffs from relitigating the claims for injunctive relief resolved by the MDL 633 settlement, minimal due process required that plaintiffs should have been allowed to opt out of the mandatory class to pursue their own damages claims. The Court stated:

> According to Shutts, minimal due process requires that "an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court," if monetary claims are involved. Because Brown had no opportunity to opt out of the MDL 633 litigation, we hold there would be a violation of minimal due process if Brown's damage claims were held barred by res judicata.

Id., citing Shutts (emphasis added).

Petitioners here primarily seek monetary relief from the antitrust injustices they have suffered at the hands of the NFL. Petitioners also seek relief from the most recent form of anticompetitive restrictive schemes inflicted upon them by the Settlement Agreement embodied in the Orders and Judgment of the District Court below, which improperly denied their right to decide their own litigation fate and imposed upon them a "new" system of player restraints just as restrictive and as unfair as any

of the NFL's earlier anticompetitive schemes. Since the White class was certified with no "opt-out" provision, and the settlement involves claims for money damages, the District Court's class certification decision did not provide the minimal due process protections the Supreme Court deemed so fundamentally important in Hansberry and Shutts.

The Eighth and Ninth Circuit Courts of Appeals are not alone in struggling with divergent authority in this area before and after Ticor and Shutts. Nor is the apparent disagreement among the circuit courts restricted to antitrust class actions. The Eleventh Circuit in In re Dennis Greenman Securities Litigation, 829 F.2d 1539 (11th Cir. 1987), for example, considered the issue of mandatory class certification. Greenman involved allegations of fraud, violations of various securities acts, and RICO counts against Greenman, a broker, Merrill Lynch, Paine Webber, and Barclay. A number of investors filed suit. The individual suits were enjoined and a class action was certified under Rule 23(b)(1). Id. at 1541. After a year and a half of discovery, the parties began to negotiate a settlement. At the parties' request, the court participated in the settlement process. Eventually a settlement was reached, conditioned on the court certifying a Rule 23(b)(1) class. A group of plaintiffs brought an appeal challenging the certification, contending that the case should only be certified as a Rule 23(b)(3) class, allowing opt-outs. After reviewing the district court's finding, the Eleventh Circuit reversed the Rule 23(b)(1) certification, expressly commenting on the due process concerns:

> The identity of judicial action that creates "inconsistent or varying adjudications" [under Rule 23(b)(1)] is not clear. Many courts confronting the issue have held that Rule 23(b)(1)(A) does not apply to actions seeking compensatory damages. . . . Underlying is the concern that if compensatory damage actions can be certified under Rule 23(b)(1)(A), then all actions could be

> certified under the section, thereby making the other sub-sections of Rule 23 meaningless, particularly Rule 23(b)(3). . .
>
> Since the plaintiffs sought compensatory damages, the district court erred by certifying the class pursuant to (b)(1)(A).

829 F.2d at 1544-45 (citations omitted). Here, this Court should review the decisions below and give the federal courts the guidance in this area it attempted to provide in Ticor.

II. THE RULINGS BELOW CONFLICT WITH DECISIONS OF THIS AND OTHER COURTS.

A. The Decisions of The District Court.

Mandatory, non-opt out class certification

As discussed, the Rule 23(b)(1) certification was error, failed to comport with decisions of this and other courts, and furthers the dispute among the courts of appeals regarding the availability of opt out rights in such cases.

Inadequate notice

In Alexander v. NFL, 1977 WL 1497 (D. Minn. 1977), the court ordered plaintiffs to send written notices by mail to class members and to publish notice in several national sports trade magazines and wire services and to take other extensive measures to publish information. The objectors in Alexander had more than 12 weeks to prepare objections to the proposed settlement. Conversely, the District Court here ordered mailed notice, publication in one national (non-trade) newspaper and allowed class members about 4 weeks to prepare and file objections.

Proper notice requirements in class action cases are necessary due process protections. Shutts, 105 U.S. at 2975. Here, the District Court failed to take adequate steps to ensure that proper notice was given. Not only is one small notice by publication inadequate, but many players (potential objectors to the settlement or class certification) did not receive any mail notice at all. 822 F. Supp. at 1399-1402 (App. 187-95). Further, the short time provided by the District Court for players to find out about the settlement, analyze the lengthy and complex legal documents, retain counsel, and prepare objections did not satisfy minimal due process requirements.

Inadequate Representation

Due process does not permit named plaintiffs or their counsel to trade away the rights of objecting class members in order to secure benefits for themselves. See generally Shutts, 472 U.S. 797 (1985); see also Holmes v. Continental Can Co., 706 F.2d 1144, 1147 (11th Cir. 1983) (when an agreement "explicitly provides for preferential treatment for the named plaintiffs in a class action, a substantial burden falls upon the proponents of the settlement to demonstrate and document its fairness"); Plummer v. Chemical Bank, 91 F.R.D. 434, 442 (S.D.N.Y. 1981), aff'd, 668 F.2d 654 (2d Cir. 1982) ("disparities must be regarded as prima facie evidence that the settlement is unfair to the class"). Unless absent class members are adequately represented by the class fiduciaries, no class result, judgment or settlement can have res judicata effect. That legal predicate is simple common sense; it also illustrates the critical importance of insuring adequate representation in mandatory, non-opt out classes. Simply put, if representation is inadequate in a mandatory, non-opt out class, an absent class members' only recourse is to object to approval of the agreement. Here, the named plaintiffs and their counsel breached their duty.

Class counsel had a conflict of interest created by their preferential negotiation on behalf of some named plaintiffs at the expense of absent class members.[21] Prior to stipulating to certify a mandatory, non-opt out class, the NFL made a number of vigorous arguments and serious allegations in opposition to class certification, including:

- Class counsel's conflicts of interest between and among plaintiffs stemming from, among other things, the "undeniable conflict of interest between plaintiffs White and ... every member of the proposed class," and class counsel's intimation that two class members would have an "absolute right to opt out of any such damages class [in White] and pursue their individual damages claims";

- Class counsel's conflicts of interest with the NFLPA stemming from the fact that class counsel was concurrently suing members of the White class on behalf of the NFLPA (class counsel's client) while seeking to be an adequate representative of all White class members; and

- Class counsel's conflicts stemming from inconsistent positions taken on behalf of different class members in related cases, namely: class counsel in White who also represented the class in Powell first proposed injunctive class certification to the District Court in Powell, then switched course and moved to decertify the injunctive class, then appealed certification of the mandatory, non-opt out class, arguing that all non-opt out classes are unconstitutional.

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[21] Obviously, an attorney with a conflict of interest cannot adequately represent the class. See, e.g., Fiandaca v. Cunningham, 827 F.2d 825 (1st Cir. 1987) (conflict created when lawyer argued inconsistent legal theories for different clients before the same court); Bachman v. Pertschuk, 437 F.Supp. 973 (D.D.C. 1977).

The District Court was unswayed by such "prima facie evidence" of inadequate representation, instead construing these conflicts as a benefit to the class of class counsel's experience. 822 F.Supp. 1404-05 (App. 202-06). At best, such a finding left undisturbed would suggest that class counsel may litigate both sides of an action, secure fees along the way, and still somehow maintain their fiduciary duty to the class. At worst, that ruling was directly contrary to prior rulings in related litigation. See Lewis v. NFL, 146 F.R.D. 5 (D.D.C. 1992) (class certification denied where class counsel sued class members). In any event, such a result does not square with the mandates of Rule 23. The due process concept of Rule 23 adequate representation is simply not outweighed by any possible "benefit" that would inure to a class represented by counsel that represented interests adverse to the class in the same case.

The class representatives only adequately represented their own interests. They were specifically exempted from the most egregious, restrictive, injunctive provisions of the settlement, and were not subject to the point allocation system for distribution of the monetary provisions of the settlement. The District Court attempted to justify that disparate result by suggesting those players took risks the class did not. 822 F.Supp. at 1423 (App. 259). That reasoning was simply unsupported by the record which showed that the named plaintiffs in the seventeen other lawsuits the District Court improperly enjoined took those same "risks." These "disparities must be regarded as prima facie evidence that the settlement is unfair to the class." Plummer, supra. Cf. In re General Motors Corp. Pick-up Truck Fuel Tank Products Liability Litigation, 1995 WL 223209 (3d Cir. April 17) (named plaintiffs who secured benefits for themselves not available to absent class members failed to meet adequacy of representation requirement; class counsel failed to adequately represent absent class interests; settlement unfair and inadequate; district court erred in accepting unreasonably high estimate of

settlement's true worth). "Thus, we must be concerned that [named plaintiffs] had no incentive to maximize the recovery of the [absent class members']; they could skew the terms of the settlement to their own benefit." Id. at *29. This Court should review whether the District Court committed reversible error under these circumstances.

Failure to approve a fair, reasonable and adequate settlement

A class settlement must be fair, reasonable and adequate. Van Horn v. Trickey, 840 F.2d 604, 606-07 (8th Cir. 1988). The District Court failed to properly apply that standard, and the Eighth Circuit erred in failing to reverse.

True free agency for all players is simply not achieved by this agreement; yet, that was the specific goal of every player who brought these suits. See 41 F.3d at 405 ("players' desire for complete free agency"). But this agreement will allow the NFL to continue to restrict player movement and be compensated for losing coveted players, just like each of the "old," illegal systems of player restraint. Nor was fair, reasonable or adequate compensation secured for the class by this agreement. A settling defendant's ability to pay an amount larger than that provided for in a settlement offer is a proper factor to consider in evaluating the fairness of a settlement agreement. Class Plaintiffs v. City of Seattle, 955 F.2d 1268, 1295 (9th Cir.), cert. denied, 113 S.Ct. 408 (1992); accord Roberts v. Heim, 130 F.R.D. 430, 439 (N.D. Cal. 1990). The financial depth of the NFL in this multi-billion dollar industry has never been in issue.[22] If the rights of certain class members have not been given adequate consideration or

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[22] Notably, the District Court appointed a Special Master in this case but did not charge her with attempting to ascertain whether a "limited fund" existed which possibly might have justified the inadequate monetary settlement achieved. See Eagle-Pitcher and Skywalk, infra.

representation during settlement negotiations, the agreement cannot be deemed fair, adequate or reasonable. Alvarado Partners, L.P. v. Mehta, 723 F.Supp. 540, 546-47 (D. Colo. 1989).

The settlement in this case does not just bode ill for the thousands of NFL players affected by the agreement. The manner in which the District Court failed to insure and protect the interests of absent class members in this multi-billion dollar industry has sweeping implications for the future of professional sports and the rights of its players.

Injunctions

The District Court erred in denying Petitioners' motions to intervene, precluding them from conducting any discovery underlying the complex, voluminous settlement, binding them to a mandatory, non-opt out class, and enjoining them from further or future prosecution of their independently filed lawsuits. Petitioners were forced to blindly accept a voluminous and complicated settlement which they had utterly no involvement in creating, much less any reliable knowledge of how it was created and what was "bargained away" by the class representatives and their counsel, and why. That was error. Burka v. New York City Transit Authority, 129 F.R.D. 80, 83 (S.D.N.Y. 1990) (discovery is relevant to whether court should approve settlement of class action); accord Ross v. A.H. Robins Co., Inc., 700 F.Supp. 682, 683 (S.D.N.Y. 1988); Schwartz v. Novo Industri A/S, 119 F.R.D. 359, 362 (S.D.N.Y. 1988); Welsch v. Gardebring, 667 F.Supp. 1284, 1290 (D. Minn. 1987); In re New Mexico Natural Gas Antitrust Litigation, 607 F.Supp 1491, 1504-05 (D.Colo. 1984); Milstein v. Huck, 600 F.Supp. 254, 262 (E.D.N.Y. 1984).

Moreover, under Shutts and Ticor, if absent class members are not afforded their minimal due process rights, a court's jurisdiction over those absent class members is improper. If that is the case, as it is here, then a court cannot properly enjoin absent

class members from either opting out of the class or pursuing their own claims for monetary relief.

Prior to Shutts, the Eighth Circuit vacated a district court's certification of a Rule 23(b)(1) class in a mass tort action, where the district court sought to enjoin state court cases. In re Federal Skywalk Cases, 680 F.2d 1175 (8th Cir.), cert. denied, 459 U.S. 988, 103 S.Ct. 342 (1982). The Court of Appeals held that to certify a mandatory class violated the Anti-Injunction Act, and discussed the necessity of finding a "limited fund" to justify a non-opt-out class. Id. at 1182-84 (citations omitted). After Shutts, it is clear that such non-opt-out damages classes violate minimum due process requirements. No such "limited fund" determination was ever made by the District Court in this case.[23] That, as well as other rulings of the District Court, was error.

The District Court's denial of Petitioners' motion to intervene violated Rule 23. See Croyden Associates v. Alleco, Inc., 969 F.2d 675, 678-80 (8th Cir. 1992). In Croyden, the Eighth Circuit held that an absent class member has standing to appeal from an order approving a class settlement between the named parties if that absent class member moves to intervene. Id. at 678, citing Guthrie v. Evans, 815 F.2d 626, 627-28 (11th Cir. 1987). Croyden observed the holding in Guthrie that there was no need to allow an absent class member to appeal a class settlement because there are three options generally available to absent class members. They can: (1) move to intervene; (2) collaterally attack the settlement by filing a separate lawsuit; or (3) opt out of the class if the class is certified under Rule 23(b)(3). Croyden at 678.

The Eighth Circuit recognized in Croyden that the absent class member in that case could not have exercised each option

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[23] Unlike other cases such as In Re Joint E. & S. Dist. Asbestos Litigation ("Eagle-Picher"), 134 F.R.D. 32, 38-39 (E.D.N.Y. 1990), in which Special Masters were specifically charged to make a determination of whether a limited fund existed, the District Court in this case never assigned those duties to the Special Master, and a limited fund determination simply was never made.

set forth in Guthrie, including opting out of the class, because the class was certified under Rule 23(b)(1) and (2). Guthrie recognized that the third option existed only if the class had been certified under 23(b)(3). Therefore, the only option available to the absent class member in Croyden was to move to intervene. Croyden at 680. That too was the only option available to Petitioners here since the District Court erred in enjoining Petitioners from prosecution of their claims. Indeed, the District Court cited Croyden in denying Petitioners' motions to intervene, see White, 822 F. Supp. at 1432, but failed to afford Petitioners either of the other two options discussed in Guthrie or the protections afforded under Ticor and Shutts. Worse, the decision of the Court of Appeals in this case forced Petitioners into a "no win" situation by creating a broad rule which will likely have a sweeping affect on the administration of federal class actions. While courts hold that intervention is a jurisdictional prerequisite to appeal, the Appellate Court here now holds that by moving to intervene, "absent class members" are no longer such and are no longer entitled to due process.

B. The Decisions of The Court of Appeals.

The decision of the Appellate Court below exemplifies the divergent decisions which this Court sought to resolve in Ticor. The Court can now resolve that issue here.

The Court of Appeals in this case acknowledged the significance of the constitutional principle articulated in Ticor, but then failed to properly address the issue. Following receipt of numerous notices of appeal, the Eighth Circuit issued a briefing schedule on October 18, 1993. By order dated February 28, 1994, the Appellate Court (on motion by Petitioners here) suspended the briefing schedule pending a ruling by this Court in

Ticor. The Appellate Court further directed the parties to inform it of this Court's decision in Ticor as soon as it became available.[24]

Despite unequivocal recognition of the significance of the constitutional rule pending decision by this Court in Ticor, the Appellate Court below erroneously failed to reach the issue. Instead, the Appellate Court reasoned that because none of the Petitioners who intervened (on a narrow and limited basis) before the District Court were "absent class members" as a procedural and jurisdictional matter, the Ticor issue could be avoided. 41 F.3d at 406-07 (App. 12-14).

None of the Petitioners were "absent" class members, the panel reasoned, because each had International Shoe[25] "minimum contacts" with the District of Minnesota, or voluntarily submitted to the jurisdiction "by appearing through counsel to contest the merits of the settlement." Id.[26] Those acts, the panel reasoned, were analogous to cases where waiver of personal jurisdiction has occurred "when a party had actively participated in discovery, filed various motions, participated in a five-day trial, and filed post-trial motions." Id., citing Yeldell v. Tutt, 913 F.2d 533, 539 (8th Cir. 1990) (citing Marquest Medical Prods. v. EMDE Corp., 496 F.Supp. 1242, 1245 n. 1 (D. Col. 1980)).[27] Accordingly, the

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[24] Each of the parties here were also fully aware of the practical and broad significance of a dispositive ruling by this Court in Ticor. In fact, most of the Petitioners and Respondents now before this Court were amici in Ticor.

[25] International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

[26] The Appellate Court's finding, that the All-Writs Act authorized the District Court to enjoin the separate lawsuits filed by Petitioners, failed completely to address how the District Court's injunctions square with the Anti-Injunction Act discussed in Skywalk, supra, or with the mandates of Shutts, Ticor and Rule 23(b)(3).

[27] Neither Yeldell, nor any of the authority cited by it in the relevant passage cited by the panel, concerns class actions. In any event, that decision is not germane to the issue here for a number of reasons. Foremost, appellants in Yeldell actively participated in all aspects of the litigation, thus giving rise to the determination that they waived their jurisdictional concerns

panel held, the District Court properly exercised *in personam* jurisdiction over each class member and, as such, was empowered to enjoin any objector from opting out and suing the NFL.

The broad constitutional implications that may be drawn from the panel's decision are that an absent class member may never challenge a district court's denial of its constitutionally guaranteed right to opt out of certain class actions without risk of forever losing its absent class member status. That decision contravenes the constitutional guarantees recognized by the Supreme Court in Shutts. Further, it creates a new ("Catch-22") precedent by which federal district courts in class actions may avoid fully considering the propriety of mandatory, non-opt out classes. This Court should review this case and decide whether that precedent should stand.

Contrary to the precedent now established by the Appellate Court in this case, an absent class member should not lose his status as such merely by appearing in the forum in order to preserve his appellate rights and challenge the unconstitutional denial of his right to opt out. Class action scholars concur:

> Thus, Shutts confirmed that class actions are an exception to traditional due process principles governing personal jurisdiction, and, in validating the opt-out procedure, announced a general rule of what process is due in class actions predominantly seeking a money judgment, whether or not class members are otherwise within the personal jurisdiction of the forum for purposes of reaching a binding judgment in a nonclass action.

– unlike the Petitioners here who were enjoined from prosecuting their own litigation or participating in the White litigation in any way, including discovery. See 822 F.Supp. at 1429 (App. 277).

H. Newberg & A. Conte, Newberg on Class Actions §1.16, at 1-43 (3d. ed. 1992) (emphasis added, citations omitted).

The Court of Appeals was mistaken in its apparent belief that the simple phrase "absent class member" means anything more than "a non-named class member." Its decision only fuels the apparent confusion surrounding this term, and improperly shifts the relevant inquiry in such cases. [28]

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[28] See Newberg §1.04, at 1-14 ("This focus of party status of absent class members is only of limited value, because it begs the underlying issue concerning whether the procedure or rule applies to persons who are not physically before the court, who are not named, identified parties to the suit, and who are interested or involved solely because they share a common issue in controversy with a named party, and the court has determined that named party will adequately represent their interest. Justice Powell's dissenting opinion in Roper emphasizes the risks of uncertainty and confusion that arise in trying to determine the implications of rights of the representative or of class members by focusing on whether absent members are parties or are present for some purposes and not for others." (emphasis in original, citations omitted)).

CONCLUSION

Upon the foregoing, a Writ of Certiorari should be granted in this case.

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SUPPLEMENTAL APPENDIX

Rule 23. Class Actions

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to

the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.